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A
SERIES OF LETTERS

TO A

Man of Property,

ON THE

**SALE, PURCHASE, MORTGAGING,
LEASING, SETTLING AND DEVISING**

OF

ESTATES.

BY EDWARD BURTENSHAW SUGDEN, ESQ.

OF LINCOLNS - INN, BARRISTER AT LAW.

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SUGDEN'S LETTERS.

LETTER I.

YOU complain to me, my dear sir, that, although utterly ignorant of law, you are constantly compelled to exercise your own judgment on legal points: that you cannot always have your solicitor at your elbow; and yet a contract for the sale, purchase, or lease of an estate, a loan, or, perhaps, even an agreement to make a settlement on a child's marriage, must be entered into off hand; and it is not until you have gone too far to retreat, that you learn what errors you have committed: that you are even at a loss in giving instructions for your will, and wholly incapable of making the most simple one for yourself: that, in a word, you have been plunged into a law-suit, which a slight previous knowledge might hap-

pily have prevented. It is unquestionably a matter of profound regret, that so vast a proportion of contracts respecting estates should lead to litigation. It is equally to be regretted, that, however desirous the man of property may be to understand the effect of his daily contracts, there is no source to which he can apply for the desired information. You ask me to remove the cause of your complaint. This I may undertake as a *friend*, without any violation of professional etiquette ; and I shall, therefore, readily comply with your wishes.

In the prosecution of my promise, I shall, endeavour successively to point out the precautions to which you must attend in selling, buying, mortgaging, leasing, settling, and devising estates. This I shall do concisely, and without incumbering you with many technical phrases. I must premise, that I shall say little which is not warranted by decided cases ; but I shall not burden you with references to them, as they lie scattered in many a bulky volume to which you have not access.

LETTER II.

To enable you to understand some terms which I must necessarily use in speaking of the remedy for breach of contract, I must explain the difference between law and equity. It is peculiar to the constitution of this country, that the law on the same case is frequently administered differently by different courts; and that not from a contrary exposition of the *same* rules. It must sound oddly to a foreigner, that on one side of Westminster Hall a man shall recover an estate without argument, on account of the clearness of his title; and that on the other side of the Hall his adversary shall, with equal facility, recover back the estate. In all other countries the law is tempered with equity, and the same grounds rule the same case in all the courts of justice. The division of our law into what is termed

legal and equitable, arose partly from necessity, and partly from the desire of the ecclesiastics of former times to usurp a control over the common law courts. Our legal judges heretofore adhered so strictly to technical rules, although frequently subversive of substantial justice, that the chancellors interfered, and moderated the rigour of the law according, as it is termed, to equity and good conscience. The judges in equity soon found it necessary, like the common law judges, to adhere to the decisions of their predecessors ; whence it has inevitably happened, that there are settled and inviolable rules of equity, which require to be moderated by the rules of good conscience, as much as ever the most rigorous and inflexible rule of law did before the chancellors interposed on equitable grounds. However, as the law of property is now administered in the different forums, allowing for the imperfection of all human laws, it exhibits a most splendid and comprehensive code of jurisprudence ; and the man will deserve ill of his country who

shall ever attempt to confound the rules by which the courts of law and equity are severally guided. Lord Mansfield, than whom a more enlightened judge never graced the bench, and who may be said to have *created* in this country an unrivalled system of commercial law, was unhappily too prone to administer equity in a court of law. The landmarks of the law of real property received a severe shock in his time; and it is painful to reflect, that although his successors have now nearly subverted the principle of every important decision pronounced by him on the law of property, yet during the period he was chief justice of England, there was scarcely a difference of opinion on the bench where he presided, so implicitly were his equitable principles adopted.

The essential difference between law and equity, as it affects the subject upon which I am writing, consists in this, that equity will give you the thing itself for which you have contracted, whereas the law can only give you

a pecuniary compensation for the dishonesty of the other party in not fulfilling his contract. Thus, if you were to sell your estate to your neighbour Tompson, and were afterwards, disliking the bargain, to refuse to convey it to him, he would have it in his election to proceed against you either at law or in equity. If he resolved to proceed at law, he would bring an action against you for the recovery of damages for breach of contract, and a jury would decide the amount of the damages which you ought to pay; but still you would retain the estate in the same manner as if you had never contracted to sell it. But if he wished to have the estate itself, he would file a bill in equity against you for what is termed a specific performance, or a performance *in specie*, and the court would not, like a court of law, in effect, let you off [the contract, on payment of damages, but would compel you to convey the estate itself to the purchaser upon his paying the purchase-money to you. But, of course, as the court compels you to

perform the agreement, there are no damages to pay. This equity is founded upon the principle, that the court considers that as actually performed which is agreed to be done; so that the instant after you have entered into a contract to sell an estate, the court considers the estate as belonging to the purchaser, and the purchase-money as belonging to you, and so *vice versa*. The terms *specific performance*, and *action for breach of contract*, will now, I hope, be familiar to you. I shall frequently be compelled to use them in the course of my correspondence.

The remedy in equity, I must remark, is open to a seller as well as a buyer, although a seller merely wants the purchase-money; so that if a vendor would prefer getting rid of the estate, and receiving the whole purchase-money, to keeping it and taking his chance of the amount of damages at law, he may apply to equity for a specific performance.

But equity will not interfere in every case. A man acting without good faith cannot require

the extraordinary aid of the court, but will be left to his remedy at law, where his bad conduct will have its full operation with a jury. And in many cases equity will not interfere, although the applicant or plaintiff, as he is called, has acted *bona fide*: for instance, where the estate has by surprise or mistake been sold at an undervalue. Thus, where the known agent of the seller bid for the estate at an auction on behalf of the purchaser, and other persons present, thinking that he was bidding as a puffer on the part of the seller, were deterred from bidding, the court, on the ground of surprise, refused to interfere against the seller, who resisted the sale.

Equity, also, looks to the substantial intention of the parties, whereas the courts of law adhere more strictly to the letter of the contract. Thus, if an estate is described in a particular of sale to be in good repair, and it turns out to be in bad repair, the seller cannot enforce the contract at law; but equity, if the purchaser is not in want of immediate posses-

sion, so that there is time to do the repairs before possession is essential to him, will compel him to take the house upon being allowed a sufficient sum to repair it: if a man sell a leasehold estate, as having 70 years to run, and the term is only 68, the purchaser will in equity be decreed to take the estate with an abatement; at law, the contract cannot be enforced by the vendor: again, if a time is stipulated for the performance of the contract, that stipulation is of the essence of the contract at law; whereas in equity, if the time was not material, or the party complaining was aware of the cause of the delay at the time of the agreement, and the other party is not wilfully lying by, equity will compel a specific performance in the same manner as if the party had been ready to perform his agreement by the time stipulated: if the seller cannot make a title to the whole estate sold, the purchaser is not at law compellable to take the part to which a title can be made; but in equity, if the part to which a title cannot

be made is not necessary to the enjoyment of the rest, equity will compel him to take it, and will allow him a proper abatement out of the purchase-money. On this head, by the way, the equity is a little in the air: a man has been compelled to take an estate, subject to tithes, although he expressly contracted for the estate tithe-free, and proved that his object was to buy an estate not subject to tithes: a man has been forced to purchase a house alone, when he contracted for the house *and* a wharf adjoining. And in one case a man purchased a house on the north side of the Thames, which was supposed to be in Essex, but which turned out to be in Kent, a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a churchwarden of Greenwich, when his object was to be a freeholder in Essex; yet he was compelled to take the house. These instances will sufficiently shew the difference, in these respects, between law and equity. The latitude which

a court of equity allows itself in enforcing agreements against the letter, and, perhaps, in some cases contrary to the spirit, of the contract, may be narrowed by the express stipulation of the parties. This should always be attended to; for instance, if you buy an estate, which is stated to be tithe-free, it should be provided that you shall not be compelled to perform the contract if the property is subject to tithes. In the face of such a stipulation equity could not compel you to take the estate without the tithes.


The ground upon which equity proceeds in the cases which I have mentioned is, that the agreement can be performed in substance. A purchaser cannot be compelled, even in equity, to take an undivided part of an estate, if he contracted for the entirety; nor a leasehold, however long the term in it may be, or a copyhold, instead of a freehold. And if you were to buy at an auction a mansion-house in one lot, and farms, &c. in others, equity would relieve you from the whole contract,

if no title could be made to the mansion-house.

From the different rules of law and equity, it frequently happens that both courts are resorted to with relation to the same contract. I will give you an instance of this: suppose you had bought an estate of Tompson, and that the agreement was to be performed by a day named, and that he made out his title, and was ready to convey to you at the time, but your money was not ready; Tompson might bring an action against you for damages for breach of the contract; but if the day appointed was not material, you might file a bill against him for what is termed an *injunction*, and a specific performance; and equity would accordingly *injoin* him not to proceed further with the action, and would compel him to convey the estate to you upon payment of the purchase-money.

If you sell an estate, your title to which proves bad, and you cannot cure the defect, equity of course cannot relieve the purchaser,

unless he choose to take the title with all its faults; but the purchaser may recover damages against you at law. However, where a man is *without fraud* incapable of making a good title, a purchaser can even at law only recover what are called nominal damages—a shilling for instance. I dare say that you think it high time this long letter should end. You must, however, preserve your patience, or I shall never make a lawyer of you.



LETTER III.

IN my last letter I mentioned the principle upon which a specific performance is decreed, viz. that the court considers that which is agreed to be done as actually performed; so that from the time of an agreement for sale the estate in equity belongs to the purchaser, and the purchase-money to the vendor. I hasten to unfold to you the very important consequences of this doctrine, to which a slight inattention on your part might totally overthrow your plans in the disposal of your property amongst your family.

I shall first consider you as a *seller*. As the estate is no longer your's, if you have devised it, it will not pass to the devisee, except as a mere trustee for the purchaser; and even if you have by your will directed it to be sold, and actually given the money to arise by the sale to a legatee, yet if you sell the estate

yourself, he will not be entitled either to the purchase-money or the estate. But the purchase-money, although not paid, will go to your personal representative in the same way as the rest of your personal property. Therefore, where you wish the money to go to the person who would have taken the estate, you should make a bequest of it to him at the time you enter into the agreement. And as you may afterwards abandon the contract, by consent of the other party, or it may be such a contract as a court of equity will not enforce, it seems desirable that you should also provide for a sale of the estate, at all events, in favour of the object of your bounty: for it is doubtful whether your prior will can stand, although the agreement is never carried into execution.

It is material here to observe, that if you give a man only an option to purchase your estate, yet if he accept it, even after your death, the nature of the property is changed. I think that I can make this quite plain to

you. You have now both land and money. I will suppose that you have by your will given your estate to your eldest son, and the money amongst your younger children. You then grant a lease of the land to Tompson, and give him an option to purchase the estate for 20,000*l.* at any time within 10 years. You would think, no doubt, that you had secured the estate to your eldest son. But on the contrary, if you die before the end of the 10 years, and Tompson, after your death, elect to purchase the estate, the money would go to your younger children, and your eldest son would be stripped of all his fortune! To obviate this, if you should enter into such a contract after making your will, you must, by a codicil, give the money to arise by sale to the person to whom you have given the estate, and then he will be secure of the property: and if you make your will after the contract, expressly declare that your devisee shall have the purchase-money, if the lessee make his option to take the estate.

I shall now consider you as a *buyer*. The estate is your's from the moment the contract is executed, and the purchase-money must be paid out of your personal property. The consequence of equity, thus deeming the estate to belong to you, is, that you may dispose of it by your will, or otherwise, even before the conveyance, just the same as if you had paid the purchase-money, and the estate were actually conveyed. You must, therefore, upon a purchase, always reflect that your disposable cash is decreased by the amount of the purchase-money; and that unless you otherwise dispose of it, the estate will go to your heir. A moment's reflection will shew what serious consequences may follow from a neglect on your part; for suppose you purchase an estate with the 50,000*l.* in the funds, which you have given by your will to your younger children, and which constitutes the bulk of your personal property, and should neglect to devise the estate, the money must go to pay for it, at the expense of your younger children,

who would be left nearly destitute, whilst your eldest son, to whom the estate would descend, would have an overgrown fortune. Distressing cases of this kind are continually happening.

If your personal property undisposed of is not sufficient to pay for the estate, it would be better, perhaps, to direct it to be sold again, and the first purchase-money to be paid out of the money produced by the re-sale. You must always remember that in devising or suffering an estate to descend which you have purchased and not paid for, your devisee or heir will be entitled to have the purchase-money paid out of your personal property, although you may have given it all to another person. A most vexatious case once happened. A younger brother agreed to purchase an estate from his elder brother; the conveyance was accordingly executed, but the money was not paid. The younger brother then made his will, giving his property to his brother, subject to legacies, and made him executor.

The will, however, was not executed so as to pass the estate. The younger brother died, and the elder brother took the estate as his heir, and also paid himself the purchase-money out of the personal property; by which he disappointed the legatees, who lost their legacies, whilst he got both the estate and the purchase-money for it.

On the other hand, you must guard against the chance of the estate not being ultimately conveyed, according to the agreement. For if equity should for any reason refuse to execute the contract, or a good title cannot be made, the person to whom you have given, or suffered the estate to descend, will not be entitled to have it paid for out of your personal property, although he may be willing to accept such a title as can be made to it; because equity will not interfere, unless there is a binding contract at the death of the party. You should, therefore, provide for the purchase of another estate, of equal value, for your devisee or heir, in case the one purchased should

not be conveyed to him. I must, however, remark, that if by your will you direct an estate to be bought, *for which you have not actually contracted*, and the estate cannot be bought according to your direction, yet equity will decree the money to be laid out in the purchase of another estate, for the benefit of the devisee.

Before I close this letter, I shall give you a caution as to your Hampshire estate, wherein you have only a long term of years, which you have bequeathed to your second son, John. **You** tell me that you are about to purchase the fee, or, as you express it, to buy the estate out and out. Now the effect of a conveyance of the fee to you will clearly be to put an end to the term, and to give you the entire interest in the estate discharged from the lease, and so the bequest to John would be defeated; and I fear that the effect will be the same, immediately after the contract is executed, and even before the conveyance. This, therefore, must be provided against by a codicil to


your will. And in giving this estate to John, after you have agreed to buy the fee, but before the conveyance, you must go a step further, and expressly declare that he shall have the lease, although he cannot obtain the fee. For if you shew an intention to give him the fee, he would not without an express provision be entitled to the lease, unless he could get the fee also. This actually happened in a case where the person who agreed to sell the fee was not owner of it, and the owner sold it to another person.

I must remind you that any estate which you may hereafter purchase will not pass by your present will, but will descend to your heir-at-law, although, indeed, if you expressly devise all the estates of which you may *die* seised, and make other provisions by your will for your heir-at-law, equity would compel him to *elect* to take under or in opposition to the will. If he elect to take under it he must convey the after-purchased estate to your devisee. If he take in opposition to your will the after-pur-

chased estate will of course belong to him, but the benefits provided for him by your will, will go to the disappointed devisee.

If you do not intend to dispose of an after-purchased estate from your heir-at-law, you must be cautious not to execute any codicil to your will in the presence of three witnesses without proper advice ; because such a codicil, although you merely give a money-legacy by it, may be held to pass the estate under general words in your will. You must be satisfied with this caution without the reasons that suggest it.

But where you have devised the estate after the agreement for purchase of it, *but before it is actually conveyed to you*, I would advise you to *republish* your will after the conveyance is executed, for it may happen that the mere *form* of the conveyance may operate as a revocation of your will in this respect.



LETTER IV.

I HAVE not yet written to you upon the precautions to be observed on the sale and purchase of estates as between yourself and the other party. This I shall now do, and first as to your conduct and duty as a seller.

I will not argue with you, whether in selling an estate you are bound in conscience to disclose all its defects to the purchaser. Moralists, as you know, agree that a seller is bound to do so, although the principle has been controverted. I shall content myself with stating how the *law* on this subject stands.

If the person to whom you sell was aware of all the defects in the estate, of course he cannot impute bad faith to you in not repeating to him what he already knew ; neither will you be liable, if you were yourself ignorant of the state of the property. And even if the purchaser was, at the time of the contract,

ignorant of the defects, and you are acquainted with them, and did not disclose your knowledge to him, yet he will be without a remedy, if they were such as might have been discovered by a vigilant man. The disclosure of such defects is at most what the civilians term a duty of imperfect obligation. *Vigilantibus non dormientibus jura subveniunt*, is an ancient maxim of our law, and forms an insurmountable barrier against the claims of an improvident purchaser. If, however, you should, during the treaty, industriously prevent the purchaser from seeing a defect which might otherwise have easily been discovered—for example, if you carefully conceal from him the necessary repairs of a wall to preserve the estate from the sea—you certainly could not obtain a specific performance against him; and I conceive that you could not even maintain an action for breach of contract; or, in other words, the contract would not bind the purchaser either at law or in equity.

So if there is a latent defect in your estate of which you are aware, and which the purchaser could not by any attention whatever possibly discover, you are it seems bound to disclose it to him, although you should sell the estate expressly subject to all its faults. Upon this point however the authorities are divided.

If you actually describe the estate in the particulars of sale or agreement, you will of course be bound by the description. And if you misdescribe the estate with a fraudulent intent, it is unimportant that you expressly stipulated that an error in the description of it should not annul the sale. This was decided in a late case, where the estate was described *to be about a mile from a borough town*; and it was provided, in the conditions of sale, that an error in the description should not vitiate the sale. It turned out that the estate was between three and four miles from the place, and, therefore, the purchaser resisted the contract, and brought an action for recovery of the deposit which he had paid. It was left to the jury to say, whether this was merely an

erroneous statement, or the misdescription was wilfully introduced to make the land appear more valuable from being in the neighbourhood of a borough-town. In the former case, the contract remained in force; but in the latter case, the purchaser was to be relieved from it, and was entitled to recover back his deposit. The purchaser had a verdict, so that the jury must have thought the misdescription fraudulent.

But although you misrepresent the nature of the property, yet the purchaser cannot be relieved, if he bought with full knowledge of the actual state of it : thus if you describe an estate to be in a ring-fence, and the buyer knew that it was intersected by other lands, or you warrant a house to be in perfect repair, and he knew that it was without a roof or windows, he cannot in either case object that the property does not agree with the description of it.

The same rules apply to incumbrances on the estate, and defects in the title to it, as to defects in the estate itself. You must either

deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise, or you must acquaint him with the facts, if they do not appear on the title deeds. If you neglect this, you are guilty of a direct fraud, which the purchaser, however vigilant, has no means of discovering. And if your attorney keep back any incumbrance, he, as well as you, will be answerable for the fraud.

Thus I have told you what truths you must disclose. I shall now tell you what falsehoods you may utter in regard to your estate. In the first place, you may falsely praise, or, as it is vulgarly termed, puff your property ; for our law, following the civil law, holds that a purchaser ought not to rely upon vague expressions uttered by a vendor at random in praise of his property. And it has even been decided, that no relief lies against a vendor for having affirmed, contrarily to truth, that a person bid a particular sum for the estate, although the buyer was thereby in-

duced to purchase it, and was deceived in the value. So you may affirm the estate to be of any value which you choose to name, for it is deemed a purchaser's own folly to credit a bare assertion like this. Besides, value consists in judgment and estimation, in which many men differ.

But if you should affirm that the estate was valued, by persons of judgment, at a greater price than it actually was, and the purchaser act upon such misrepresentation, you could not enforce the contract in equity. Nor can you with impunity misstate the quantum of rent paid for the estate, because that is a circumstance within your own knowledge: the purchaser may have no other source of information; or your tenants, if he were to apply to them, might combine with you, and so misinform and cheat him. And the purchaser will have a remedy against you for the fraud, although he did not depend upon your statement, but inquired further.

What I have hitherto said applies mostly

to your own conduct. I have still a few cautions to give you in regard to those things which must be performed by your agents.

Although it is usually done, yet you should never permit the particulars and conditions of sale to be prepared by an auctioneer. Auctioneers know nothing of the title, and continual disputes arise from their misstatements. When a man has an estate to sell, he generally goes first to an auctioneer ; but I advise you to go to an attorney.

If the estate which you intend to sell has been in your family for a length of time, or the title has not been recently investigated, it would be prudent to have an abstract of it submitted to counsel in the first instance. This will enable you to clear up any objection which occurs, before you enter into a contract for sale of the estate. By this precaution you will prevent any delay on your part, which might impede the completion of the sale, by the time stipulated ; and you will, in many cases, avoid the expense necessarily attending

tedious discussions of a title. Another advantage of this measure is, that, if there should be any defect in the title which cannot be cured, it will be known only to your own agents and counsel. It is, believe me, of the utmost importance to keep defects in your title from the knowledge of persons not concerned for you. It has frequently happened, that persons concerned for purchasers have communicated fatal defects in a vendor's title to the person interested in taking advantage of them, by which many titles have been disturbed.

It would be useless to state to you what provisions should be contained in the particulars and conditions of sale. They must be prepared by your solicitor. I may, however, observe, that the nature of the property should be correctly stated, and that where the estate is held under the same title, and sold in lots, some provision should be made as to the expense of copies of deeds, to which all the purchasers would otherwise be entitled at your

expense ; a burden that has frequently considerably reduced the amount of the purchase-money. It is generally provided that the auction-duty shall be paid in moieties by the vendor and purchaser. If no stipulation is made as to it, the whole will fall upon you.

If your auctioneer, without an authority for that purpose, give credit to the purchaser, or accept a security for the deposit, it is entirely at his own risk—you may recover the money from him. But the auctioneer is entitled to retain the deposit paid to him, until the contract is completed, because he is considered as a stake holder or depositary of it. And you should be cautious whom you employ, for it is not clear that any loss by his insolvency would not fall upon you.

If you, or your agent, buy in the estate at an auction, no auction duty will be payable ; but before you venture to bid, you must ascertain that the proper notices required in this case, by act of parliament, have been given to the auctioneer ; for otherwise you must pay

the duty on your bidding, in the same way as if you had actually purchased another's estate. If the auctioneer state to you, before witnesses, that he has done what is necessary to avoid payment of the duty, you will be safe; and if he has neglected, or even mistaken the proper means, he himself will be liable to it. With the above precaution, you may, without public notice, safely appoint a person to bid for you at the sale, in order to prevent the estate from being sold at an under-value. This is generally termed *puffing*. Cicero in his Offices, declares his opinion, that a vendor ought not to appoint a puffer to raise the price, nor ought the purchaser to appoint a person to depreciate the value of an estate intended to be sold. And Huber, the civilian, lays it down, that if a vendor employ a puffer, he shall be compelled to sell the estate to the highest *bona fide* bidder, because it is against the faith of the agreement, by which it is stipulated that the highest bidder shall be the buyer. Great contrariety of opi-

tion has prevailed in our courts, as to the
 legality of appointing a puffer; but it is now
 settled, that you may employ a person to pre-
 vent a sale at an undervalue. But if you go
 beyond this, and send a puffer to take advan-
 tage of the eagerness of bidders to screw up
 the price, that will be deemed a fraud, and
 the sale will not be binding on the purchaser.
 Neither can you safely appoint more than *one*
 person to bid. It is highly proper, that a man
 should be permitted to appoint a person to
guard his interests against the intrigues of bid-
 ders; but it does not follow that he may ap-
 point more than one. The only possible ob-
 ject of such a proceeding is fraud. An auction
 so constituted is simply a mock auction. Your
 case, it may be thought, would be obnoxious
 to the same rule were you to appoint even *one*
 puffer, with unlimited power, to take advan-
 tage of the eagerness of bidders to increase
 the biddings. And if you state in the particu-
 lars, or advertisements, that the estate is to be
 sold *without reserve*, it seems clear that the sale

would be void against a purchaser, if any person were employed as a puffer, and actually bid at the sale. ♦

If the estate is sold at the auction, but your title prove bad, so that the purchase goes off, you will be entitled to a return of the auction-duty. This is provided for by the auction-duty acts; but the provision is too frequently a dead letter, owing to the very strict evidence which is required by the commissioners of excise, of the seller's inability to make a title. It has frequently happened, that although a man was *bona fide* incapable of making a title, and the sale was not completed, yet he has, in direct opposition to the provision which I have referred to, been refused a return of the duty. This is not the mode to render revenue laws respected, and to procure their observance.

If you employ an agent to sell an estate by public auction, a sale by private contract is not within his authority; nor does it seem to be material, that the estate sold for more than the price fixed, for it might have fetched a

still greater sum at a public auction. But if an agent is directed to sell an estate by private contract, and he dispose of it by public auction for a larger sum than the principal required, I conceive, that in most cases, the sale would be binding on the principal;

LETTER V.

I SHALL now dismiss you from your character of a seller, and treat you as a buyer.

In running over, in my last letter, the misstatements which a seller may with impunity make, you will hardly suspect me of intending to point out, as a guide for your own conduct in selling, the exact limit of prudent rascality. I, of course, was looking to the situation in which I now consider you to stand: for when you know how far an unprincipled vendor *may* with safety go, you can guard against fraud, by not trusting to misrepresentations, which are made without fear of retribution.

With the exception of a vendor, or his agent, suppressing an incumbrance, or a defect in the title, it seems clear that a purchaser cannot obtain relief against him for any incumbrance or defect to which his covenants

do not extend ; and, therefore, if a purchaser neglect to have the title investigated, or his counsel overlook any defect in it, he has no remedy beyond what the seller's covenants may afford. It has even been laid down, that if one sell another's estate, without covenant or warranty for the enjoyment, it is at the peril of the purchaser, because he might have looked into the title ; and there is no reason he should have an action by the law, where he did not provide for himself. I may remark, by the way, that as counsel, that is barristers, have no remedy for recovery of their fees, which are considered purely gratuitous and honorary, they are not deemed liable to their clients for any blunders which they commit, however gross. But it is otherwise as to attorneys. They may maintain an action for their fees ; and if a purchaser is damaged by the gross want of skill in an attorney, or by his neglect to search for incumbrances, he may recover, at law, against the attorney, for any loss which he may sustain. But where the

attorney has acted under the advice of counsel, he is safe. To return :—You will collect from the observations in my last letter, that as a purchaser, you are entitled to relief, on account of any *latent* defects in the estate, or the title to it, which were not disclosed to you, and of which the vendor, or his agent, was aware. In addition to this protection afforded by the law, you, as a provident man, ought not to trust to the description of the vendor, or his agents, but to examine and ascertain the quality and value of the estate yourself, and you should have the title to it inspected by counsel.

I may here remark, that although a vendor is bound to tell the purchaser of *latent defects*, yet a purchaser is not bound to acquaint the vendor with any *latent advantage* in the estate—if you were to discover that there was a mine on an estate, for which you were in treaty, you would not be bound to disclose that circumstance to the vendor, although you knew that he was ignorant of it. Nor need

you as a purchaser adhere closely to truth, in procuring the estate at as cheap a price as you can. In a late case, where a false statement by a purchaser was held not to give the seller a right of action, Lord C. J. Mansfield said, that the question was, whether the purchaser was bound to disclose the highest price he chose to give, or whether he was not at liberty to do that as a purchaser which every seller in this town does every day, who tells every falsehood he can to induce a buyer to purchase.

In regard to false representations to a purchaser of value or rent, I must still observe, that the same remedy will lie against a person, *not interested in the property*, for making such false representations, as might be resorted to, in case such person were owner of the estate; but the statement must be made *fraudulently*, that is, with an intention to deceive. whether it be to favour the owner, or from an expectation of advantage to the party himself, or from ill-will towards the other, or from mere wantonness, is immaterial. And in these

cases, to use the language of the master of the rolls, it will be sufficient proof of fraud to shew first, that the fact as represented is false: secondly, that the person making the representation, had a knowledge of a fact contrary to it. The injured party cannot dive into the secret recesses of the other's heart, so as to know whether he did or did not recollect the fact; and, therefore, it is no excuse in the party who made the representation to say, that though he had received information of the fact, he did not, at that time, recollect it.

And on the same ground, if a person having a right to an estate, permit, or encourage a purchaser to buy it of another, the purchaser will be entitled to hold it against the person who has the right, although a married woman, or under age. And the same rule has even been extended to a case, where the representation was made through a mistake, as the person making it might have had notice of his right.

If you should suspect that any person has a claim on an estate which you have con-

tracted to buy, you should, before proper witnesses, enquire the fact of him, *at the same time stating that you intend to purchase the estate*; and if the person of whom the enquiry is made, have an incumbrance on the estate, and deny it, equity would not afterwards permit him to enforce his demand against you. The witnesses, in this case, should take a note of what passes, because a witness may refresh his memory, by looking at any paper, if he can afterwards swear to the facts from his own memory.

Where it is stated upon a sale, even by auction, that the estate is in lease, and there is no *misrepresentation*, the purchaser will not be entitled to any compensation, although there are covenants in the lease contrary to the custom of the country, because whoever buys, with notice of a lease, is held conusant of all its contents: whenever, therefore, you have notice of a lease, or even that the estate is in the occupation of a tenant, you should not sign a contract for the purchase of the estate,

until your solicitor has seen and read the leases, unless the vendor will stipulate, in writing, that they contain such covenants only as are justified by the custom of the country. And even such a stipulation is not quite satisfactory, for there is frequently great difference of opinion, as to what is the custom of any particular place.

Where difficulties arise in making out a good title, you must not take possession of the estate, until every obstacle is removed. Purchasers frequently take this step, under an impression, that it gives them an advantage over the vendor, but this is a false notion: such a measure would, in most cases, be deemed an acceptance of the title. If, however, the objections to the title be remediable, and you should be desirous to accept possession of the estate, you may, in most cases, venture to do so, provided the seller will sign a memorandum, importing that your taking possession shall not be deemed a waiver of the objections to the title. And although it is not

advisable to do so, yet you may, with the concurrence of the seller, safely take possession of the estate at the time the contract is entered into; because you cannot be held to have waved objections of which you were not aware; and if ultimately the purchase cannot be completed, on account of objections to the title, you will not be bound to pay any rent for the estate, unless the occupation of it prove beneficial to you.

Where you purchase any equitable right, of which immediate possession cannot be had—for instance, money in the funds, standing in the names of trustees, in trust for a father for life, and after his decease for his son; and you buy the son's interest during the father's life-time—you should previously to completing the contract, enquire of the trustee, in whom the property is vested, whether he has had notice of any incumbrance. If the trustee make a false representation, equity would compel him to make good the loss which you may sustain in consequence of the fraudulent

statement. When the contract is completed, you should give notice of the sale to the trustee. The notice would certainly affect his conscience, so as to make him liable in equity, should he convey the property to any subsequent purchaser; and would also, I apprehend, give you a preferable title to any former purchaser, or incumbrancer, who had neglected the same precaution.

If you should purchase, with notice of the claim of another, although he has not a conveyance, and you actually procure the estate to be conveyed to you, yet you will be bound in equity by the notice; for it is a general rule in equity, that a purchaser, with notice, is bound to the same extent, and in the same manner, as the person was of whom he purchased. I will give you an instance of this. You know that I have lent *Tompson* 1000*l.* and that he has agreed to secure it by a mortgage upon his estate. Now this gives me merely an equity, that is, a right to call upon him in a court of equity to execute a mort-

gage to me, Till that is done, the entire ownership at law remains in him. If you should purchase the estate from him before the mortgage is executed, and had not had notice of my loan, you would hold the estate discharged from it; for by the conveyance you would get the legal estate, and by the contract the equitable estate; so that having both law and equity on your side, you would prevail over me who have equity only. For it is a rule, never departed from, that a *bona fide* purchaser, for a valuable consideration, and without notice, shall not be affected in equity. This has been carried so far, that a purchaser has been allowed to take advantage of a deed, relating to the estate, which he stole out of a window, by means of a ladder. I could hardly, however, advise you to be so bold at the present day. But in my case, as you have notice of the loan, you would be bound by it, although you procure the legal estate, and equity would accordingly compel you to execute a mortgage to me pursuant to

Tompson's agreement. In all these cases, therefore, you should stop your hand.

Notice, I must observe, before payment of all the purchase-money, although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract.

It is not necessary, that you should have *express* notice ; for instance, in my case, it is not essential that you should actually see and read Tompson's agreement with me ; for equity holds many acts to amount to *constructive* notice to a purchaser ; and constructive notice is equally binding with actual notice. Against some of these you cannot guard by any precaution, but there is one of which I must warn you. Notice to your counsel, attorney, or agent, would be notice to you, for otherwise, to use Lord Chancellor Talbot's words, a man who had a mind to get another's estate, might shut his own eyes, and employ another to treat for him, which would

be a manifest cheat. And the same rule prevails, although the counsel, attorney, or agent, be the vendor, or be concerned for both vendor and purchaser. The notice, however, must be in the same transaction, because, as Lord Chancellor Hardwicke observed, if this were not the rule of the court, it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more liable than others of less eminence to have notice as they are engaged in a great number of affairs of this kind.

It can seldom happen, that your attorney, or agent, has notice of any incumbrance on an estate which you intend to purchase, unless he is employed by the seller, as well as you; attornies are frequently employed on both sides, in order to save expense. This practice has been discountenanced by the courts, and is often productive of the most serious consequences; for it not rarely happens, that there are incumbrances on an estate,

which can only be sustained in equity, and which will not bind a purchaser who obtains a conveyance without notice of them. Now, as I have just mentioned, notice to your agent, although concerned for the vendor as well as you, is treated in equity, as notice to you; and, therefore, if the attorney is aware of any incumbrance, you will be bound by it, although you yourself were ignorant of its existence.

And by employing the vendor's attorney you may even deprive yourself of the benefit to be derived from the estate lying in a register county; the register may be searched, and no incumbrance appear; yet if the attorney have notice of any unregistered incumbrance, equity will assist the incumbrancer, in establishing his demand against you. I must explain to you, that the register counties are Middlesex and York; and all instruments affecting lands in those counties are required, by act of parliament, to be registered in offices kept for that purpose, and they are declared

to be binding, according to their priority of registry. But although your conveyance should be duly registered, yet if you had notice of a prior unregistered conveyance, equity would hold you liable to it; for the acts of parliament were only intended to give you notice of prior deeds; and if you have notice independently of the acts, the intent of the legislature is answered.

Another powerful reason why you should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate, to which the attorney is privy, you, although it be proved that you were innocent, will be responsible for the misconduct of your agent. In one case a purchaser lost an estate, for which he gave nearly 8000*l*. merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase-money.

LETTER VI.

I HAVE not yet dismissed you from your character of a purchaser.

In bidding at an auction, you may countermand your bidding, at any time before the lot is actually knocked down; because the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller, by knocking down the hammer. Every bidding is nothing more than an offer on one side, which is not binding on either side, till it is assented to. If a bidding was binding on the bidder, before the hammer was knocked down, he would be bound by his offer, and the vendor would not, which can never be allowed.

At a sale you need only look at the particulars and conditions. An auctioneer cannot contradict them at the time of sale, by a verbal statement; although, perhaps, you

would be bound, if he could bring home to you particular personal information of it. A mere general statement to the company will not however affect you, either at law, or in equity. I need not suggest to you how far a man may, consistently with good faith, take advantage of the omission in the particulars, if he distinctly understood the verbal statement at the sale.

If you employ a person to bid for you, and he bid more for the estate than you empowered him to do ; he himself would be liable, but you would not. But unless you expressly limited him as to price, it seems that you would be bound.

If after employing a man to bid, you should be so *dishonest* as to deny the authority (in seeking instruction, you must not quarrel with your master's mode of conveying it), the agent, unless he could prove the commission, would be compelled to complete the purchase himself; but he would afterwards, by filing a bill in chancery, be able to put

you to your oath as to the transaction; and if you denied the authority, he might have the question tried by a jury; and if you admitted, or he could prove the authority, you would be compelled to take the estate at the sum which you authorized him to bid for it. I need not tell you, that by falsely denying the authority in your answer to his bill, you would incur the risk of the pillory.

On the other hand, if you merely employ a man by parol, that is by word of mouth, to buy an estate for you, although he buy it accordingly, yet if he hold himself out as the real purchaser, *and no part of the purchase-money was paid by you*, you cannot compel him to convey the estate to you, because that would be directly in the teeth of an act of parliament, called the statute of frauds (29 Charles the Second, chapter 3.) which requires a writing in such cases. And although the man should afterwards be convicted of perjury in denying the trust, yet that will not enable equity to compel him to convey the

estate to you ; but as you cannot avail yourself, in any civil proceeding, of the man's conviction, you would be a competent witness to prove the perjury. You would, therefore, have at least the satisfaction of making an example of him : the only legitimate object of all punishment.

The vendor cannot object that your agent purchased in his own name, whereas he is a trustee for you ; for it happens in a vast proportion of cases, that the contract is entered into in the name of a trustee, and the mere fact of a quarrel having taken place between the seller and you, totally unconnected with the subject of the contract, or even a bare refusal by the seller to deal with you, is not a sufficient ground for his refusing to convey to you.

But if you applied to purchase the estate, and the owner expressly refused to treat with you, unless the money was paid down, which you were unable to do, and then you procured some other person to purchase the estate on

your account, it seems clear, that at least the purchase-money must be ready at the very day appointed. So if you should apply to Mr. Bigg, to sell you an estate on behalf of Tompson, for whom, as we know, he has a great affection, and Bigg should, on that account, be induced to take less for the estate than he otherwise would have done ; or even, perhaps, without this circumstance, the agreement could not be enforced against Bigg, unless it was really made on behalf of Tompson ; but if Tompson would patronise the sale, execution of the agreement would be compelled, although he might sell the estate to you the next day.

The following case shews to what extent this doctrine is carried. A purchaser of a house adjoining to another occupied by the seller, agreed with the seller verbally, that he would not let the house to any person not agreeable to him. A man of the name of Langstasse applied for a lease, and stated that he knew the vendor intimately, and that there

would be no objection to granting him a lease. The seller, however, disapproved of Langstaffe, and so far from knowing him intimately, had only seen him at a tavern. Lord Chancellor Camden set aside the agreement which Langstaffe had obtained, with costs. A similar case is mentioned in Hawkins's Life of Johnson.

I must here observe that you cannot, even at an auction, purchase any property for yourself, of which you are a trustee for another. If, however, the person for whom you are a trustee is, what we lawyers term, *sui juris*, that is of legal capacity to contract for himself, he may certainly sell to you, but you must first, with his assent, shake off your character of a trustee, and you must freely disclose to him all your knowledge of the property. For the rule is, not that you may not buy from the person for whom you are trustee, but, that as a trustee you cannot buy from yourself. And in all cases of this nature, equity looks with a very jealous eye on the transaction. The same rule forbids an

assignee of a bankrupt to buy the bankrupt's estate himself, without at least the consent of the majority of the creditors ; and it has even been thought by high authority, that the consent of *all* the creditors is absolutely requisite.

I may here notice a case which will probably happen to you. Under your settlement, on your first marriage, you are tenant for life, with a power to sell or exchange the estate with the consent of your trustees ; and under the settlement on your second marriage, you are tenant for life of another estate, with a similar power, only it is to be exercised by the trustees, with your consent. Now, under similar powers, many tenants for life have, with the concurrence of the trustees, bought the estates themselves, or taken them in exchange for some of their other estates of equal value ; and such sales and exchanges have been considered by great authorities to be authorized by the powers, notwithstanding a doubt which had prevailed in the profession on the point. But the question has again been agitated in prac-

tice, and I would not, until the point is settled, advise you to deal with your trustees under either of your powers.

If you purchase an estate, and take a conveyance of it in the name of a stranger, as the real purchaser, although you have no declaration of trust from him, yet you will be entitled to the estate, if it can be proved that it was paid for with your money. If, however, you deliberately declare, although verbally, that the purchase was made for the man's benefit, he will be entitled to retain the estate as his own. And if you take a conveyance in the name of one of your children, for whom you have not made a provision, without declaring him a trustee for you, the consideration of blood between you, will fix the estate in the child, although illegitimate, for his own benefit; nor can you defeat his claim by any *subsequent* declaration of your intention. The same rule applies to a purchase in the name of your wife, or of a grand-child, if its parent is dead. But all purchases of this kind are open

to much objection. If you intend the conveyance to be for the party's own benefit, it should be expressly declared to be so on the face of it. If, on the contrary, you mean it to be in trust for yourself, the trust should be declared by the deed, or you should take a declaration of trust by a separate instrument.

If you and another purchase lands, and advance the money in equal portions, and take a conveyance to yourselves and your heirs, the survivor will take the whole estate ; for the purchase would be considered to be made by you jointly of the chance of survivorship, which may happen to the one of you as well as the other. But where the proportions of the money are not equal, and this appears in the deed itself, the rule is otherwise, and the survivor will be a trustee for the representatives of the other, in proportion to the sums which you severally advanced. However, even where the money is advanced equally, you should never take a conveyance in this way ; but the

estate should be conveyed to you, and the other purchaser, in moieties. There is no relying on the joint-tenancy: the other party may defeat it by a secret deed, which, if you survive, will be produced, and his heir will be entitled to his share; whereas, if he survive, he will keep it back, and claim the whole estate.

I must still observe, that in all cases of joint undertaking or partnership, although the estate will belong to the survivor at law, yet in equity he will be a trustee as to the share of the deceased partner for his representatives; so that if you and another were to take a building-lease jointly, and lay out money in erecting houses on the land, the survivor would be compelled to assign a moiety of it to the representatives of the deceased.

If you and another are in treaty for the purchase of an estate, and you agree to desist and permit him to go on with the intended purchase, upon his promising to let you have a part of the estate, you should require a

written agreement from him ; for it seems, that although he should get the estate, he would not be bound by a mere parol, or verbal agreement, to convey part of it to you.

LETTER VII.

MY observations upon sales and purchases now draw to a close, and I dare say that you think it is high time they should. The present letter concerns you both as a buyer and seller.

Generally speaking, a *written* agreement is essential to a valid contract for the sale or purchase of an estate: This is rendered essential by the statute of 29 Car. II. c. 3. usually called the statute of frauds; and it must be signed by the party whom you wish to be bound by it, or his agent, to whom a verbal authority for that purpose will be sufficient; and the agreement must distinctly contain all the terms, such as the names of the parties, the estate to be sold, and the consideration to be given for it: nothing can be supplied by parol evidence. There are, indeed, some exceptions to this rule in equity—If the party resisting the contract admit the agreement,

and do not claim the benefit of the statute, or if he have acted fraudulently, equity will compel the fulfilment of the agreement, although merely verbal, and not reduced to writing, and signed by the parties. As an instance of what is deemed a sufficient fraud to enable equity to relieve, I may observe, that if you were verbally to sell me an estate, and I in performance of part of the agreement were to lay out money in repairs, you could not afterwards resist my claim to a conveyance of the estate.

Letters which have passed between parties have frequently been held to amount to an agreement; therefore, in writing about the sale or purchase of an estate, you should always cautiously declare your offer, or proposal, not to be final, lest the other party should entrap you, against your intention, into a binding contract. If upon a treaty for sale of your estate, you should write a letter to the person wishing to buy it, stating that if you part with it, it shall be upon such and such terms (spe-

cifying them), and such person, upon receipt of the letter, accept the terms mentioned in it, your letter will be deemed equivalent to an agreement. So if you are in company, and make offers of a bargain, and then write them down, and sign them, and another person take them up, and prefer his bill against you, the proposal will be binding on you. But if it appears, that on being submitted to any person for acceptance, he had hastily snatched it up, had refused you a copy of it, or if from other circumstances, fraud in procuring it may be inferred, it seems, that in case of an action, it would be left to the jury to say, whether you intended it, at first, to be a valid agreement on your part, or as only containing proposals in writing, subject to future revision; and if the aid of equity be sought, these circumstances would have equal weight with the court. In every case it must be considered, whether the note, or correspondence, import a concluded agreement: if it amount merely to treaty, it will not sustain an action or suit,

and a letter must, like a regular agreement, contain all the terms.

A receipt for the purchase-money, if it contain the terms, will be a sufficient agreement. And even a letter to your attorney, stating the terms, and directing him to carry the agreement into execution, will have the same operation.

It is not, however, sufficient, that a person present at the making of the agreement reduced it into writing, unless it was signed by the parties ; nor is the delivery of rent-rolls, particulars of the estate, abstracts of title, &c. on the treaty for sale, equivalent to an agreement ; neither is it sufficient, that both parties verbally direct an attorney to prepare the conveyance : with the exceptions before alluded to, there must be an agreement signed by the *party to be charged* ; that is, by the party against whom relief is sought ; for if you sign an agreement to sell or buy an estate, the other party acting *bona fide* may proceed against you, although he himself never signed it.—

You should always require the party, with whom you deal, to sign when you do.

I may observe, that the price to be paid for the estate is not weighed in very nice scales. As the rule now stands, the consideration must, indeed, be grossly inadequate, or unreasonable, to enable equity to refuse its aid; and at law, unless it is merely fraudulent and nominal, the amount of the consideration would not prevent the party benefitted from recovering damages for a breach of the contract by the other party. But fraud is an exception to every rule. A case arose, where an agreement was made for sale of land, at a halfpenny per square yard. The price was in all about 500*l.* the real value 2000*l.* The purchaser went out to an attorney, got him to calculate the amount, and desired him not to tell the vendor how little it was; then carried the agreement to the vendor, and prevailed on him to sign it immediately. The desire of concealment was considered such a fraud as would void the transaction, because parties

to a contract are supposed, in equity, to treat for what they think a fair price.

But I must remark, that the case of an heir selling his expectancy stands on its own grounds, and very slight circumstances will enable equity to set aside the contract. It has been laid down, that the heir of a family, dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided; but as pernicious in principle, and therefore repressed. There are two powerful reasons why sales of reversions, by heirs, should be discountenanced; the one, that it opens a door to taking an undue advantage of an heir being in distressed and necessitous circumstances, which may, perhaps, be deemed a private reason; the other is founded on public policy, in order to prevent an heir from shaking off his father's authority and feeding his extravagancies, by disposing of the family estate.

Never leave the price to be fixed by surveyors or arbitrators ; for if they refuse to value the estate, or disagree in the valuation, you cannot enforce the performance of the contract. This, however, is not the case, where it is merely agreed, that the estate shall be taken at a fair valuation, without specifying the mode in which it shall be made. But even this mode is objectionable.

If upon the purchase of an estate you pay a deposit, and afterwards become entitled to a return of it, because the seller cannot make a title, you would not be compelled to take any stock, in which he may have thought proper to invest it without your consent. And your assent will not, it seems, be implied from notice having been given to you of the investment, to which you did not reply. It would not however, be prudent to be silent in such a case. Where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it is for the benefit of both parties to enter into an arrangement

for an investment of the deposit, so as to make it productive of interest.

You cannot as a purchaser, because delays arise, deposit your money at a private banker's, or in the Bank of England, or convert it into stock at the risk of the seller ; notwithstanding such a deposit, the principal will remain entirely at your own risk ; nor is it material that you gave the vendor notice of the deposit, unless he took the risk on himself, by agreeing to accept it as a payment. And as he would not be bound, without his express assent, by a deposit, he could not, unless he had bound himself, come and claim any benefit by a rise in the funds. So if you sell out stock to answer the purchase-money, and the title prove bad, without any fraud in the seller, and then you re-purchase at a loss, you are not entitled to any allowance on that account : for you had a chance of gaining as well as losing by a fluctuation in the price of the stock.

Continual disputes arise as to *interest*. The purchaser is entitled to the profits of the

estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate ; and as from that time the money belongs to the vendor, the purchaser will be compelled to pay interest for it, if it be not paid at the day. Upon this rule, no difficulty could ever arise, if the purchase-money were not frequently lying dead ; in which case it becomes a question upon whom the loss of interest shall fall. The loss must be borne by the party by whom the delay has been occasioned. It seems, however, that although the delay is with the seller, and the money is lying ready, and without interest being made by it, yet notice should be given to him that the money is lying dead, because otherwise there is no equality, the one knows the estate is producing interest, the other does not know that the money does not produce interest ; and in all cases where a purchaser resists the payment of interest, he must shew that the money was lying dead, and *bona fide* appropriated to answer the purchase. But I

would advise you never to let your money lie dead ; you can at least lay it out in exchequer-bills ; and some how or other, each party invariably insists that the other has occasioned the delay.

In the case of timber on an estate to be taken at a valuation, interest on the purchase-money will only commence from the valuation, although the interest on the purchase-money for the estate itself may be carried a great way back, because surveyors always value timber according to its present state ; and the augmented value of the timber by growth, is an equivalent for the interest from the time of the contract to the making of the valuation.

The usual rate of interest allowed in equity is four *per cent.* ; but in proper cases the court will give five, because that is now the current interest of money ; and to give only four is holding out an inducement to persons to delay the completion of contracts.

I may here observe, that as the estate belongs to the purchaser from the time of the

contract, he is entitled to any benefit which may accrue, and must bear any loss which may happen to it before the conveyance. If a house is even burned down, yet the purchaser must pay for it, although the seller permit the insurance to expire without giving him notice. You should, therefore, upon entering into an agreement to buy a house, provide for the insurance of it till the completion of the contract: again, if you agree to buy an estate held for lives, and all the lives drop the next day, still you must pay your money. On the other hand, if you purchase a reversion subject to an estate for life, you will be entitled to a conveyance at the original price, although the estate has fallen into possession by the death of the tenant for life. In all these respects our law agrees with the civil law.

If you buy an estate, in consideration of an annuity, which you are to pay to the seller for life, and he die before the estate is conveyed to you, or even before a payment of the annuity become due, yet you will be entitled

to a conveyance of the estate without, in fact, paying for it. But in a case of this kind, if a payment of the annuity become due before the conveyance is executed, you should cautiously pay it on the very day; for a neglect on your part would, it seems, bar your right to the estate, if the seller should afterwards die before it is conveyed to you.

As a concluding observation, I may remark, that if a man, by mistake, purchase from another an estate, to which he himself is entitled, he may recover back the money which he paid for it.

LETTER VIII.

As you are anxious to obtain church preferment for one of your sons, I shall state to you how far you may legally buy it. The great object is to steer clear of *simony*, which is a corrupt contract for an ecclesiastical benefice. It derives its name from Simon Magus.

It is clear and direct simony to purchase a presentation whilst the living is vacant, but the great probability of a speedy vacancy is immaterial, if the purchase be not corrupt. It is unimportant, therefore, that the incumbent is on his death-bed, and that it is uncertain whether he will live over the night. A man, with full notice of this circumstance, may safely purchase, and the death of the incumbent the next moment, will not impeach the validity of the transaction. A man may purchase, whilst the living is full, the next or any other presentation; and he may purchase the

advowson, either whilst the living is full, or even during its vacancy ; but in the latter case, the presentation could not be obtained by the purchase of the *advowson*, for the avoidance cannot be granted, because it is against public utility, and opens a door to simony. But although the avoidance does not pass in such a case, yet, if the purchaser of the *advowson* usurp the right of presentation, the offence of simony will be committed.

But a man cannot purchase a presentation, even whilst the living is full, with an intent to present a particular person, and afterwards legally present him ; it is even doubtful, whether such a purchase and subsequent presentation can be legally made by a father for his child. And where the living is vacant, if the *advowson* is purchased with a corrupt view for presenting, that may avoid the purchase. And therefore if you purchase a presentation or an *advowson*, whatever your intentions may be, you should not disclose them.

A clergyman is prohibited from buying a

presentation, but he may purchase the advowson itself, and upon a vacancy cause himself to be presented.

Where a man has an advowson, and is desirous to present a particular person, for example one of his sons, and a vacancy happen before he is capable of filling the living, it is usual to present some person, who gives a bond to the patron to resign, when the person for whom the living is ultimately intended shall be of age to receive it. This is a case which is very likely to happen in your family. *General* bonds of resignation were formerly very common, by which the incumbent became bound to resign the living at any time, upon the request of the patron. Such bonds had repeatedly been held to be legal, but equity always interposed, and prevented them from being made an instrument of oppression, or from being used for the commission of simony. In the time of Lord Chancellor Thurlow, however, it was decided in the House of Lords, upon a division, 19 against 18, that such bonds are illegal.

The courts have however not given up their ancient rule, where the case is not precisely like that determined in the Lords. Therefore, you may take a bond from the incumbent to reside on the living, or to resign to the ordinary if he do not return to it within a time to be fixed after notice, and also not to commit waste, for such a condition only inforces the performance of moral, legal, and religious duties. So you may make it a condition, that he shall keep the buildings in repair, and that he shall resign upon notice, in order that one of your infant sons may be presented to the benefice.

I do not think it necessary to point out to you the forfeitures and punishments which are incurred by simony. They are very heavy, and yet are not sufficient to deter men from every day committing the crime which they are intended to punish.

I have now discharged my promise to you, so far as relates to your sales and purchases.

LETTER IX.

MORTGAGES are the next subject to which I shall direct your attention.

A *mortgage* is a security for money lent. The borrower is stiled the *mortgagor*, the lender the *mortgagee*.

You cannot by any device, elude the statutes against usury, which prohibit you from reserving or *taking* more interest than 5*l.* per cent. per annum ; so that although you only reserve 5 per cent. yet you will commit usury, if you *take* more. An exception has, however, been introduced by the legislature, in favour of estates in Ireland and the West Indies, upon mortgages of which 6 per cent. is allowed to be taken. The wit of man cannot devise a mean of avoiding these statutes, and even a collateral benefit to the lender, as a lease granted to him at the time of the loan, has been relieved against in equity, on account of its usurious

tendency, but it is not usurious to receive the interest quarterly or half yearly.

It is also settled, that you cannot prospectively make interest principal, so as to carry interest ; therefore a stipulation in a mortgage deed, that every quarter's interest in arrear shall become principal and carry interest, would be void. You must wait till the interest is actually due, and then a regular instrument should be executed, making the interest principal.

A day is always named for payment of the principal. If it is not paid at the day the mortgagee (the lender) may at any time recover it, but the mortgagor (the borrower) cannot compel the mortgagee to receive it, without first giving him 6 calendar months notice of his intention to pay it off. If he make a regular tender of the money on the day on which the notice expires, although the lender refuse to accept it, yet interest will no longer run : but to stop the interest, a regular tender must be made on the precise day.

In advancing money on mortgage, the estate is regularly transferred by conveyance to the lender, but is made redeemable on repayment of the money and interest. The mortgagee takes the absolute interest in the estate at law, but in equity, the mortgagor is still owner of the estate to all intents and purposes. He may settle or devise the estate in the same manner as if he had not mortgaged it; and if he devise it before the mortgage, his prior disposition will, subject to the mortgage, still remain good, nor will a reconveyance to him upon paying off the money, affect the validity of the will. But if he make a disposition of the estate beyond the mortgage, it may operate as a total revocation of a prior will.

In mortgages of copyholds, it is not usual for the mortgagee to be admitted. If the owner surrender the estate to his will (which is an essential circumstance to enable him to devise his copyhold estate) he may devise it without a new surrender, although he has subsequently surrendered to a mortgagee, but if

he have not surrendered it to his will, his surrender to a mortgagee, who is not admitted, will not enable him to devise, but he must first make a surrender to his will. If, however, the mortgagee be admitted, then the owner may, in equity, devise the estate without any further surrender.

So the mortgagor may sell the estate, and pay off the mortgage out of the purchase money, or he may sell it subject to the mortgage; but a purchaser in the latter case, should either require the mortgagee's concurrence, or should be satisfied that the account stated by the mortgagor alone is correct, and should give notice to the mortgagee of the sale immediately after it is completed.—A man buying an estate subject to a mortgage, is without any express stipulation bound to indemnify the seller against the debt.

A mortgagor cannot after a mortgage, make a lease binding on the mortgagee. The mortgagee may at any time evict a tenant holding under such a lease.

It is always stipulated in mortgages, that, until default shall be made in payment of the money, the mortgagor shall quietly enjoy the estate. After default has been made, the mortgagee may obtain possession of the estate, but although he becomes absolute owner of the estate at law, yet he cannot make a lease of the lands without an absolute necessity so to do, which will bind the mortgagor; and as in these cases the property is considered a mere security for the debt, which belongs to the personal estate, although the estate descend to the heir of the mortgagee, yet he will be a mere trustee for the executor. It is usual in order to prevent the difficulty of obtaining a conveyance from an heir at law, who may be an infant or a married woman, or may be out of the kingdom, for mortgagees to expressly devise the estates vested in them by way of mortgage to trustees, with a declaration that the mortgage money shall be considered as personal estate. If a mortgagee in possession, wish the estate to vest in his devisee, as real estate for his own

benefit, he should expressly devise it to him, and not trust to its passing under a general devise of all his real estate.

A mortgagor, even after default in payment of the money, is not liable to account to the mortgagee for the rents during the time which he has been suffered to remain in possession.

A mortgagor may vote at an election notwithstanding the mortgage, unless the mortgagee be in the actual possession or receipt of the rents of the estate, in which case the latter is entitled to vote, nor can a mortgagee qualify himself as a member of the House of Commons under a mortgage whereof the equity of redemption is in any other person, unless he shall have been in possession of the estate for seven years before the time of his election.

A mortgagee in possession, should keep regular accounts ; for he is liable to account to the mortgagor for the profits which he has, or might have received, without fraud or wilful neglect ; he is answerable for wilful neglect, although not guilty of actual fraud ; for in-

stance, if the mortgagee turns out a sufficient tenant, and having notice that the estate was under let, takes a new tenant, another substantial person offering more. But in general, if the mortgagor knows that the estate is underlet, he ought to give notice of that circumstance to the mortgagee, and to afford his advice and aid for the purpose of making the estate as productive as possible. A mortgagee in possession, may appoint a bailiff and receiver, and charge the estate with their salaries ; but if he choose to take the trouble on himself, he cannot charge for it, not even if the mortgagor agree to make him an allowance, for that would be to give him something beyond his principal and interest.

The mortgagee cannot justify committing waste on the estate, unless the security is defective, and in that case the waste must be productive of money, which must be applied in relief of the estate, nor can he enter upon any speculation at the risk of the mortgagor ; therefore, if he open a mine or quarry, he

must do it at his own risk, and yet, the profit from it would be brought into the account against him. He need only keep the estate in necessary repair, and if he increase the interest in the estate, as by renewing the lives, where the estate is held upon lives, he will be entitled to be repaid the sum advanced with interest, which will be considered as an additional charge on the estate.

Generally speaking, a mortgagee of an advowson cannot present to it ; because it would be illegal to sell the presentation. The mortgagee therefore, as he cannot bring the presentation into the account, must present the nominee of the mortgagor. But where the mortgage is absolute, equity will not restrain the mortgagee from presenting, unless the mortgagor will pay off the mortgage money at a short day, for it may be, that the mortgagor will not redeem, and in that case the presentation belongs to the mortgagee.

Neither the mortgagor nor mortgagee can by any adverse act, bar the right of the other.

And if a man with a bad title make a mortgage, and afterwards, by any means acquire a good title, he must confirm the mortgage. So if he obtain an increased interest in the estate, as a renewal of a lease, it will be considered as a graft upon the original stock, and be liable to the mortgage. And by a parity of reason, if the mortgagee acquire a renewed interest in the mortgaged estate, it will, subject to the mortgage, be in trust for the mortgagor.

If a mortgagee is allowed to remain twenty years in possession without account, the mortgagor is barred of all his right in the estate, for after that period, equity will not assist him in redeeming the estate. But if the mortgagor was under any disability to prosecute his claim, viz. infancy, coverture, insanity, imprisonment, or beyond the seas, ten years would be allowed after the removal of the disability. These periods are not arbitrarily chosen, but are fixed by analogy to the statutes of limitation, which require persons who have a right of entry on an estate, to prosecute their rights

within those times ; and in these cases, if the time once begin to run, no subsequent disability will stop it.

An account settled between the parties, or a deliberate acknowledgement by the mortgagee, that he is still only a mortgagee, as by devising or transferring, the mortgage as such, will open the redemption ; and in these cases, a mortgagee who is not desirous to open the redemption, should be cautious not even in conversation to admit that the estate is redeemable.

On the other hand, if the mortgagor is suffered to remain twenty years in possession without any demand or payment of interest, it will in general be presumed that the principal and interest have been paid, and the estate reconveyed.

If a mortgagee will not reconvey upon payment of the principal, and interest, and costs, and the right to redeem is still open, the mortgagor may, by a bill in equity, compel a redemption. On the other hand, if the mortgagee is desirous either to obtain back his money, or to have the estate discharged of any

right of redemption, he may file a bill against the mortgagor for what is termed a *foreclosure*, and the mortgagor will be decreed to pay the money and interest at a day named, or to stand foreclosed of all right to redeem the estate. After such a decree is perfected, if default is made in payment of the money, the mortgagee becomes absolute owner of the estate. But equity will be anxious not to hastily foreclose the mortgagor, and therefore under proper circumstances the time limited for payment of the money will be enlarged more than once, if there is a fair prospect of the mortgagor being able to repay the money. This is frequently a great hardship on the mortgagee, but the rule is not extended to a bill by the mortgagor for redemption; the time there will not be enlarged.

If a man make a second mortgage, without giving the second mortgagee notice of the first mortgage, or if he make a mortgage after having otherwise incumbered the estate, and do not within six months after notice given to

him by the mortgagee, pay off the incumbrances, he will, by a legislative provision, be barred of all equity of redemption, or right to redeem the estate.

A mortgage is assignable, and the concurrence of the mortgagor in the transfer is not essential. But the assignee will take subject to the real state of the account between the mortgagor and mortgagee, and therefore he should be well satisfied that the account is correct if he dispense with the mortgagor's concurrence. An assignee of a mortgage is entitled to the whole sum due, although he buy it at a less price.

In the outset of this long letter, I told you that you cannot legally take more than 5 per cent. per annum as interest for the loan of money. The policy of this provision has frequently been questioned. Bentham's ingenious defence of usury is in the hands of every one. Experience has shown that if

the wants of mankind rise above the law, it must, however strictly penned, give way to them. History proves, that in every country where laws have been made against usury, they have been evaded whenever the supply of money was not equal to the demand. Most countries have been anxious to establish a low rate of interest, because that is deemed an almost infallible proof of the flourishing condition of a state. In England, as in other countries, the laws against usury have been completely evaded. This was effected by the introduction of life annuities. The borrower agrees to give 10 per cent., for example, for the loan. The lender then names three lives, and the borrower grants him an annuity for those lives, and the survivor of them, equal to the 10 per cent. ; and in some cases, the expense of insuring the last life. The annuity is made repurchasable by the borrower. It was a considerable time before this sort of transaction in all its bearings was deemed legal. After its validity was estab-

lished, life annuities, from the pressure and extravagance of the times, became so common, and such gross frauds were practised on borrowers, that the Legislature deemed it proper to interpose its strong arm, and place these transactions under certain restraints. The chief object was to disclose the name of the real lender, and to give publicity to the transaction. This measure, however, was not attended with all the salutary consequences which were expected ; it was therefore lately repealed, and more simple provisions substituted for attaining the same end. Three lives in these cases are named, in order to save the expense of insurance ; for in all these cases, the lender will not advance his money unless his principal can be assured to him ; and it is taken for granted, that the annuity will be repurchased. The borrower cannot secure the repayment of the principal. That would render the transaction usurious. For the ground upon which life annuities are not deemed within the statutes of usury is, that the principal is sunk, and it is not consi-

dered an objection to this doctrine, that the grantor or borrower *may* repurchase the annuity. But in point of fact, the borrower always does secure the repayment of the principal ; for he either grants the annuity for so long a period as to render it certain, that the annuity will be repurchased before it expires ; or if the annuity is granted only upon one life, which is done where the borrower has only a life interest to secure the annuity upon, the amount of the insurance is invariably added to the rate of interest agreed to be given, so that the lender either stands his own insurer, which however is rarely done, or insures the life in one of the public offices. By these means, he receives the stipulated rate of interest, and when the annuity ceases he receives back his principal. The only essential difference, therefore, between this case and a common loan is, that the lender's capital is tied up during the period agreed upon ; and he cannot compel the repayment of it. For this inconvenience, he should certainly

be allowed to receive more than common interest, but whether some better plan than the present might not be adopted for effecting this end, I must leave it to wiser heads than mine to determine.

LETTER X.

IT now comes in order to give you a few instructions as to leases. What I have to say on this head will lie in a narrow compass.

Leases not exceeding three years from the time of making them, whereupon the reserved rent amounts to two-thirds of the improved value, may be granted by parol, or word of mouth ; but all other leases must be in writing, according to the provisions of the statute of frauds, which I have before mentioned, and so must an *agreement* for a lease, however short the term ; although here, as in the case of purchases, equity will in some instances, for which I refer you to my 7th letter, enforce even a parol agreement to grant a lease. To this, however, a party should not trust.

An agreement for a lease, like an agreement for purchase, must contain the names of the parties, the consideration, viz. the rent

and also the property to be demised, and for what term. The parties must sign the agreement by themselves, or their agents, in like manner as an agreement for a purchase. And the caution which I before gave you, in regard to writing letters, about the sale or purchase of an estate, applies equally to leases. I must observe, that nothing can be added to an agreement of this kind by parol evidence: you cannot, for instance, if the agreement is silent on that head, shew that the tenant agreed verbally to pay the land-tax. The parties must stand or fall by the written agreement. Therefore, whatever the terms are upon which you agree, you must reduce them to writing.

If you should ever be under the necessity of entering into an agreement to grant a lease, without the assistance of your solicitor, insert an express declaration, that it is meant to be an agreement, and not an actual lease. It has frequently happened, that what was intended by the parties as an agreement only, has been construed to be a lease, by which

means the tenant has evaded the conditions which would have been imposed on him, if a regular lease had been granted.

It is highly desirable, that agreements for leases should contain a minute of the covenants to be entered into by the tenant. Disputes frequently arise as to the covenants to which the landlord is entitled. If you wish your tenant not to part with the lease without your consent, you should stipulate by the agreement, that a proper clause for that purpose shall be contained in the lease; because you cannot insist upon such a restraint, unless it is bargained for.

If you agree to grant a building lease, the tenant must engage by the lease to insure the property, although the agreement was silent on that head; but the rule is otherwise as to tenants at a full rent, or, as we term it, a rack-rent. If, therefore, you mean that a tenant at rack-rent shall insure at his own costs, you must make him agree to do so by the *contract*. If you omit this, the lease must be so framed as to exempt him from making good accidents by fire. But even in this case *you* are not bound

to insure ; and although the house should be burned down, yet the tenant must continue to pay the rent : so that each bears his burden, you lose your house, and the tenant loses his rent during the term. If, however, you have insured, although not bound to do so, and received the money, you cannot compel payment of the rent, if you decline to lay out the money in re-building. It is material, however, to observe, that whatever may have been the *agreement*, unless the tenant is exempted by the *lease* from making good accidents by fire, he must, under the common covenants to repair, rebuild the house if it is burned down.

You cannot make your tenant pay your property-tax ; for if he even agree to do so, the agreement will be void.

If you agree to grant a man a lease, and he afterwards says that he is merely a trustee for an insolvent who claims the lease, you are not bound to grant it.

It may be useful to state, that if you grant, or even agree to grant a lease, to hold for seven or fourteen, or any other number of years, in

the alternative, the option to determine the lease at the end of the first term mentioned is in the tenant, and not in you ; therefore, if this is not your intention, you should expressly provide by the agreement, or lease, that the option shall be in you as well as the tenant.

You should always before granting a lease consider what interest you have in the estate. If you are merely tenant for life, without a power of leasing, you must not grant a lease beyond your own life. If you have only a *power* to grant a lease, which is the case with every man whose property is settled on his family, you should communicate that circumstance to your solicitor, and furnish him with a copy of the power, because a very slight deviation from it—for instance, executing the lease in the presence of one witness, instead of two—may render the lease void, by which you may not only ruin your innocent tenant, but may, by the covenant which you must enter into with him, for quiet enjoyment of the land, subject your estate to make good his loss, in case he is evicted by

the person entitled to the estate after your death. This has too frequently happened. A very painful instance occurred in the year 1778. Sir John Astley, and his wife, settled her estate to certain uses, with a power of leasing to Sir John. They then, under a power in the settlement, gave the estate, after their deaths, to Lord Tankerville. Sir John granted a lease under his power, and died. Lord Tankerville, when he came into possession, took advantage of a defect in the lease, and turned out the tenant, who recovered his loss out of Sir John's estate, under a covenant entered into by him for quiet enjoyment: so that his property suffered severely by the act of the person to whom he had joined, with his wife, in giving the estate.

If you are restrained by your power from taking a fine on granting a lease, you must not accept any sum whatever from the tenant. But, although you are required to reserve the best rent which can be obtained, yet you are not compellable to take the highest actual offer for a lease, provided you act *bona fide*,

and reserve a proper rent ; because in the choice of a tenant there are many things to be regarded, besides the mere amount of the rent offered. There should, however, be some strong prudential reason to induce you to grant a lease to one at a lower rent than is offered by another.

You may exercise a power of leasing for your own benefit. For this purpose you must procure some person as your trustee, to become bound for the rent, &c. For if a proper person is legally bound to pay the rent and perform the covenants, it is unimportant to the person succeeding to the estate, that the beneficial interest belongs to another. The person to whom the lease is granted should execute a deed, declaring him to be a trustee for you. I have only one other caution to give you as to leases. Carefully avoid comprising in the same lease, at an entire rent, property, some your own, and some over which you have merely a power ; such a lease would be void as to the property comprised in the power.

LETTER XI.

THE subject for the present letter is the settlement of your estates.

I may premise that the statute of frauds, to which I have so often referred you, requires agreements, made upon consideration of marriage, to be in writing, and signed by the party to be charged therewith, or his agent. A letter, however, is considered a sufficient agreement, if it contain the terms, and amount to an offer. In one case a man wrote a letter, signifying his assent to the marriage of his daughter, and that he would give her 1500*l.*; and afterwards, by another letter, upon a further treaty concerning the marriage, he receded from the proposals of his letter. And, at some time afterwards, he declared, that he would agree to what was propounded in his first letter. It was held, that this letter was a sufficient promise in writing; and that

the last declaration had set up again the terms in the first letter. Reliance, however, should never be placed on a mere letter.

Equity will, in some cases, relieve a party, on the ground of fraud, although there is not a valid agreement. A man of the name of Halfpenny, upon a treaty for the marriage of his daughter, signed a writing, comprising the terms of the agreement; and afterwards designing to elude the force of it, and get loose from his agreement, ordered his daughter to put on a good humour, and get the intended husband to deliver up the writing, and then to marry him, which she accordingly did; and Halfpenny stood at the corner of a street, to see them go by to be married, and afterwards refused to perform the agreement. He was, however, compelled by equity to do so; although, while the case was before the court, he walked backwards and forwards, calling out to the judge to remember the statute, which he humorously said, *I do, I do*; and

he held the case to be out of the statute, on the ground of fraud.

In settling an incumbered estate, you should always make some provision for payment of the incumbrances, otherwise the incumbrancer might, as sometimes has happened, enter and receive all the profits, to the exclusion of your wife and children. Where a considerable jointure is provided for a wife, and large portions for younger children of the marriage, it is desirable to appropriate a part of the estate for each, and not to charge the whole estate with both. If you make a settlement on a son's marriage, in your life-time, you should make some provision for the event of his dying before you, leaving children. A fund must be provided for their maintenance in that event.

The common settlement on a marriage, of the intended husband's real estate, is to the husband for life, then to secure the wife's jointure and the younger children's portions

and subject thereto ; to the first, and other sons, successively in tail ; and then to the daughters as tenants in common in tail, with cross remainders in tail, and ultimately to the husband in fee. The operation of such a settlement, is to give the estate after the husband's death, subject to the jointure, and younger children's portions, to the eldest son, and after him to his issue *ad infinitum* ; and if they fail, to the other sons, and their issue, successively in like manner. If they all fail, then the daughters take equally, and the share of each daughter goes to her issue in like manner ; but if there is a failure of issue of any daughter, her share goes over to the other daughters and their issue. If all the children die without issue, the estate reverts to the husband, and he may dispose of it by deed or will, subject to the interests of his widow and children. The estates which children thus take are termed estates tail. When the eldest son attains twenty-one, he, and his father together, can unfetter the estate, and

re-settle it as they please, subject only to the jointure and portions. And after the father's death, the son may do it by himself: nor can the father defeat his power of alienation. Where a son attains twenty-one, in his father's life-time, the father frequently grants his son a provision during their joint-lives, in consideration of which the son joins with his father in re-settling the estate in such manner that if he dies without issue, the estate may go over to the younger branches of the family. Sometimes, instead of a rent-charge, the estate itself is given to the wife for life, after her husband's death; in which case the son cannot, after his father's death, and during her life-time, unfetter the estate without her concurrence.

The desire of continuing an estate in the male branch frequently induces the parent to give the estate, in the first instance, to the issue male of his sons, with remainder to his daughters, not altogether, but successively, and to their issue male only; and in that case

no provision is made for the female issue of his sons and daughters, unless there is a failure of issue male. This mode of settlement, a lawyer would shortly describe thus : to the first and other sons, successively in tail male ; remainder to the first, and other daughters successively in tail male ; remainder to the first, and other sons successively in tail general ; remainder to the first, and other daughters successively in tail general. The mischief of this plan is, that the estate may go backwards and forwards from one branch of the family to the other. Thus if you have an only son, and he dies, and leaves a daughter, but no son, the estate will go over to your eldest daughter ; but if she dies, and leaves no son, although she leaves daughters, the estate will belong to the daughter of the eldest son.

It is very usual to give the estate merely to the issue male of the marriage, and then to direct it to revert to the parent, subject to the widow's jointure, and the daughters' portions ;

but where this plan is adopted, additional portions are mostly provided for the daughters, in case there is a failure of issue male. On the other hand, an estate is sometimes given amongst all the children, as well sons as daughters, and their issue equally ; in which case, of course, no money is directed to be raised for the portions of younger children.

In making a marriage settlement, a man should always look to a future marriage. His wife may die young, leaving an infant family, and he may have no power to jointure any other wife, or to provide portions for the children of any other marriage. The same observations apply to a woman who is about to settle property on her marriage.

Sometimes a separate provision is made for a wife during her husband's life-time. This is called pin-money. It is always the first charge on the estate, so that the husband takes subject to it. If, however, a wife permit her husband to receive her pin-money, or what

is the same thing, don't claim it, and he maintain her, she cannot, after his death, compel payment of the arrears out of his estate.

It is usual to reserve such powers in a settlement as will conduce to the benefit of the parties, or the estate. Thus powers are almost always given to grant building leases, and leases at rack or full rents, and even to sell the estates and buy others, or to exchange them for others. Sometimes a party objects to the introduction in his settlement of powers to lease, or to sell and exchange; but it is almost useless to make such an objection, for the settlor himself may wish to have such powers during his own life; and after his death, the persons succeeding to the estate, may with ease get the omission supplied by a private act of parliament. Where an undivided part of an estate is settled, a power should be given to the trustees, to join in a partition of the entirety, and take back a divided part of the estate.

In executing the powers vested in you by

your settlement, you must always be guided by good faith : if under a power to lease at rack or full rent, without taking a fine or premium, you accept a bonus, you commit a fraud on the power, and your lease will accordingly be void ; if you exercise a power to jointure your wife, with a stipulation that she shall join with you in securing your debts on her jointure, the appointment will be void. Nor must you abuse your authority. If you have a power to sell settled estates, and to lay out the money in the purchase of other estates ; although there is a direction in the settlement, that until a purchase is found, the money shall be laid out in the funds ; yet the intent of the power is, that one estate shall be sold only for the purpose of laying out the money in the purchase of another. Therefore you cannot sell the estate, in order to keep the purchase-money out at interest, for that would increase your income at the expense of the capital. It would, it is true, give you five *per cent.* instead of three ; but the same money would not, at a

distance of time, purchase an estate of the same value as that which you sold.

In some instances, equity will restrain rights given by a settlement, with which you may conceive that they ought not to interfere. Under your marriage settlement, you are tenant for life, *without impeachment of waste*, or in other words, you are not punishable for committing waste, and consequently you may legally cut down as much timber on the estate as you please. But still *equity* will not suffer you to cut down any trees which are an ornament, or afford shelter to the mansion-house, or to any of the buildings on the estate, or which grow for ornament in any of the vistas, avenues, walks, pleasure-grounds, or plantations, on the estate. Nor can you justify the act, by having yourself planted even millions of trees on the estate subsequently to the settlement; therefore, if a man making a settlement really mean to reserve power to cut whatever timber he please, whether it afford ornament or shelter, or not, the intention should be expressly declared in

the settlement. The power which the courts of equity have assumed, to restrain the exercise of the right, which the words “ without impeachment of waste ” confer at law, is a power which one cannot but lament they should possess. The court can, in general, only judge of the ornament or shelter afforded by the trees from the affidavits in the cause. Men unhappily are but too ready to support the cause of their principal, without always considering sufficiently the justice of it: affidavits flatly contradicting each other are, in these cases, almost invariably made by the agents of the different parties. This facility of restraining a tenant for life from exercising his *legal* right, foment and irritates domestic strife; makes the son the shameless antagonist of his parent in an open court of justice, and fixes into eternal enmity that disagreement which conciliation might happily have effaced. If such a proceeding wound the peace of a parent, in the evening of his days, how severe a punishment does the

child inflict on himself! To save a few perishable trees, he preserves, whilst they last, a monument of his want of filial duty: he keeps a signal to remind his own children of the duty which they owe to him. I remember a pretty little story which you may not think inapplicable to this subject.—A father gave up his estate to his son, and went to dwell in his son's house. The son soon neglected the unhappy parent. One day in particular he, by ill usage, drove the poor old man from the company at dinner to his own room, where, with tears, he lamented the bitter ingratitude of his son. A child of the son's came into the dining-parlour, and said that his grandpapa was crying. Go, said the unnatural son, and give him a blanket to go begging in. No, said the child, I will give him half only.—Why half only?—I will keep the other half against I turn you out a begging, when I am a man.

Equity will also restrain a tenant for life, although *without impeachment of waste*,

from defacing or pulling down the mansion-house. This was done in the year 1716, in Lord Bernard's case. He had almost totally defaced the mansion-house, by pulling down great part of it, and was going on entirely to ruin it, whereupon the court not only enjoined him not to proceed further, but compelled him to re-build, and put it in the same plight and condition it was at the time of his entry thereon.

Where money, to any amount, is settled, a power should be reserved of laying it out in land, to be re-sold when convenient, and in the mean time to be treated as money.

In money settlements generally, and sometimes even in settlements of real estate, a power is reserved to the parent to appoint the property to all, or such of the children as he shall think fit. If the power is only to appoint the proportions amongst the children, he cannot exclude any: every one must have a share, and although the gift of a share merely nominal would be a bad execution of the power,

yet he may make a vast disproportion in the shares. Of course, where the power is to appoint to any exclusively, he may give all to one. But still in this, as in all other cases, the power must not be abused. An appointment cannot be made to a child under any stipulation for the parent's benefit; for example, that he shall join in a sale of the estate, although the child may, after the appointment, if he think fit, join with his father in selling the estate, and the transaction cannot be impeached; if the money is fairly paid to the father and son. So if you have a power to appoint a sum to any of your children, at what age you please, you cannot appoint it to a sickly child, under age, in order that upon his death you may get it as his administrator.

Almost any instrument, however informal, upon which the intention clearly appears, will be deemed in equity a good execution of a power of jointuring, or of appointing property to your children; but such difficulties arise in these cases, that I cannot too much

impress upon you the necessity of never doing any act in relation to estates over which you have only a power, without first applying to your solicitor.

Where a power is given to appoint a fund amongst children, and the property is given to them in default of appointment, it is mostly declared, that no child shall take a share of any part unappointed, without bringing his appointed share into hotchpot—which word hotchpot, our famous judge Littleton, with great gravity, tells us is, in English, a pudding. The object of this provision is to compel a child, to whom part is appointed, to bring his appointed share into the general fund, *if he is desirous to take a share of the part unappointed*. Thus, suppose there to be two children, and the fund to be £200, if you give £20 to one, he must give up that, in order to obtain an equal share of the £200 with the other child. This you should always keep in view, and more particularly where there is not such a clause in the settle-

ment ; for in that case a child would not only take the part actually appointed to him, but would be entitled equally with the other children to the residue, although this can seldom be the intention of the party executing the power.

If you should ever covenant to purchase and settle estates, you will, if you are wise, perform the covenant in your life-time. However, if you do purchase estates, which are proper to go in performance of your agreement, they must go accordingly, although you have permitted them to descend to your heir ; consequently he will not be entitled to retain them for his own benefit.

It is not unusual for a parent upon a daughter's marriage, to agree to leave her at his death, a fortune equal to his other children. Such an agreement does not confine or restrict the father's power ; he may alter the nature of his property from personal to real, or he may give scope to projects, or indulge in a free and unlimited expense—but

he will not be allowed to entertain mere partial inclinations and dispositions towards one child, at the expense of another. If his partiality does rise so high, and he will make a difference, he must do it directly, absolutely, and by a gift surrendering all his own right and interest, he must give out and out; he must not exercise his power by an act, which is to take effect, not against his own interest, but only at a time when his own interest will cease. He cannot, for instance, give property in his lifetime to one child, reserving the interest to himself; for such a gift is, in fact, testamentary, and in fraud of his agreement.

If after you have disposed of an estate by will, you make a settlement of it, under which the estate is still vested in you, subject to the interest given to others; I advise you to republish your will. Partial interests may in some cases be created, so as not to affect the operation of a prior will as to the interest left in the settlor; but the form of settlements is generally such as to revoke a prior will: and,

therefore, if you only settle the estate on your wife for life, you should cautiously inquire whether the conveyance renders a republication of your will essential, or, perhaps, it would be better to re-publish your will without inquiry.

Sometimes a man is advised, under the circumstances of his title, to levy a fine, or suffer a recovery. Now these acts operate as a revocation of a prior will ; and, therefore, if you should do either, immediately afterwards re-publish your will.

I have no more cautions to give you as to settlements, and therefore adieu.

LETTER XII.

I now write to you upon the last subject on which I have promised you any information. It has been in some measure anticipated in my third letter : and the 11th contains a few hints as to re-publishing your will.

Before making your will, there are many questions which you must ask yourself.—Is it probable that I shall be much in debt at my decease? What is the nature of my property? Is any part of it already settled on my family? Have I charged portions on any part of it for my children? Is my wife dowable of any part of it? These are questions which you should resolve before you give instructions for your will. If any part of your family estate is leasehold, you should direct it to go along with the estate with which it is held. This lawyers can easily effect, to the utmost limits which the law allows. If your children are entitled to portions, you should declare, whe-

ther you intend what you give them by your will to be in addition to their portions, or in satisfaction of them. The same observation applies to your wife's dower ; for if you even give her an annuity out of the very estate of which she is dowable, yet she will be entitled to her dower also, unless you declare it to be in lieu of dower.

If you have given your children legacies by your will, and afterwards advance portions with them on their marriage, you should declare, by a codicil, whether they are still to be entitled to the legacies.

Should you wish family pictures or plate, or other valuable articles to go with your estate, you should give them as heir-looms.

If you have a copyhold estate, you must carefully surrender it to the use of your will, and I advise you to expressly devise it as *copyhold* estate. If, indeed, you make other provisions for your heir at law, which he is desirous to take, he will, on the principle of election, be bound to make good your dis-

position of your copyhold estates, although not surrendered to the use of your will. But upon this you should never rely. Immediately after you are admitted to a copyhold estate, surrender it to the use of your will.

In giving instructions, where you wish your estate to remain in your family, state to your solicitor, whether you mean your sons' daughters to be preferred to your own or not; and whether your sons' daughters are to be preferred to your daughters sons, and so on; and also state what powers you wish them to have—as to lease, jointure, grant portions for younger children, sell and exchange, &c. Never in your will say generally, that your debts shall be paid. Such a declaration always creates a question out of what fund they are payable; for as you are not in trade, your real estate is by law exempt from your simple contract debts, that is, debts not secured by bond, judgment, or the like. The fund out of which your debts are to be paid should be particularly specified. I need not remind you,

that he who neglects to provide a sufficient fund for payment of his debts, is justly said to sin in his grave ; and yet it is, as it seems to me, very far from desirable, that the legislature should put real estate on the same footing in this respect with personal property.

I am somewhat unwilling to give you any instructions for making your will, without the assistance of your professional adviser. It is quite shocking to reflect upon the litigation which has been occasioned by men making their own wills. To put off making your will, until the hand of death is upon you, evinces either cowardice or a shameful neglect of your temporal concerns. Lest, however, such a moment should arrive, I must arm you in some measure against it.

If your estate consists merely of what is called personalty, as money, goods, leasehold estates, and the like, you may make your will yourself, without any witness ; and any two persons who know your hand-writing, may, after your death, prove it. But it is better to have

witnesses, in order that the execution of the will may be proved without difficulty. But if you make your will by yourself, do not put upon it any attestation, as it is termed, for a witness to sign. If you do, and afterwards neglect to get a witness to sign it, your will will be deemed incomplete, on the ground that you did not intend it to operate until it was attested. The attestation to a will of personally generally runs, "Signed and published by the above-named testator, in the presence of us;" and under this the witnesses sign their names. In making your will always appoint an executor, which may be done in these words, "I appoint my friend William Stewart, executor of this my will."

It is not uncommon for a man to make his own will at intervals. If a man will act so unadvisedly, he should regularly sign his name where he leaves off, declaring that he means what precedes to stand for his will. If he neglect this, however numerous his dispositions may be, they will all be held void on the

ground that the will is incomplete. And if the will comprise real estate, it must be attested in the same manner as if it were a complete will, of which I shall presently speak.

In giving a leasehold estate, do not bequeath it generally, or during your present term, but give it “for all the term which you shall be entitled to therein, at the time of your decease.” For unless you adopt this mode, a renewed lease will not pass by your will, without a republication. And if the estate is held for lives, and not for years, you must republish your will, in case you renew the lease.

Never give a legacy of stock or money as part of any fund in your possession, but give it generally. For if you give a man 500*l.* *part of the 3 per cents. standing in your name,* that will make the legacy specific; and if you afterwards sell the stock the legatee will lose his legacy, although you should die worth millions; but if you give him 500*l.* *3 per cents. generally,* your executor must buy that sum

for the legatee out of your personal property, if you leave no stock to answer it.

To pass real estate, the statute of frauds (29 Charles II. c. 5. s. 15.) to which I have so frequently had occasion to refer you, requires the will to be in writing, and signed by yourself, or some other person in your presence, and by your express directions, and to be attested and subscribed in your presence, by three or four credible witnesses. I will not disclose what is deemed a sufficient compliance with this provision, but I will tell you, that a prudent man will sign and seal his will, in the presence of three witnesses, tell them that it is his will, and that he publishes it as such, and requests them to witness it ; and he should see that they do, *in his presence*, sign the following attestation to be written at the end of the will : “ Signed, sealed, published, and declared, by the above-named testator, as and for his last will and testament, in the presence of us, who in his presence, and at his request, and in the presence of each other,

have hereunto signed our names as witnesses thereto."

It often happens, that the witnesses are servants who cannot write, and in that case their marks will be sufficient. Witnesses who only make a mark, are usually called marksmen. Do not let any person witness your will to whom you have given a legacy, for by becoming a witness he will lose the benefit of it. This the legislature found it necessary to enact, in order that such witnesses might be competent to prove the will ; the judges having previously held, that a legacy to a witness affected his competency.

There is one thing of which I must particularly warn you. If you were to give all your goods to me, I should take the entire interest in them, without further words ; but if you were to give me all your freehold, or copyhold lands, without saying more, I should only take a life estate in them, and after my death they would go to your heir. This is a distinction, which is not generally understood,

except by lawyers. The books swarm with cases on questions like this. They arise daily. A man thinks, when he gives his house to another, that he gives him the entire interest in it, in the same way as if it were a horse. If, however, you intend to give the estate out and out, you must either add what we call words of inheritance to the gift, or words tantamount to them. It is better not to tell you what is equivalent to words of inheritance, you should use the very words themselves. Thus if you wish to give your estate in Kent to your wife, not for her life merely but out and out, you should give it to “her, her heirs, and assigns for ever:—“I give to my wife, her heirs and assigns for ever, my mansion-house, and all and singular my lands and other hereditaments in the county of Kent, with their appurtenances.” These words, *heirs and assigns*, I must observe, enlarge the gift, so as to invest the devisee with the uncontrollable right in the estate, and make it descendible to his heir, if he do not otherwise dispose of it. Where

you intend to give a life estate only, say, "I give to my wife, and her assigns, during her life, my mansion-house," &c. as before; and if you wish the devisee for life to have a power to cut timber, add, "without impeachment of waste."

If you give a country-house, carefully specify what closes or lands you mean to go with it.

If you wish to tie up your property in your family, you really must not make your own will. It were better to die without a will, than to make one which will only waste your estate in litigation to discover its meaning. The words "children," "issue," "heirs of the body," or "heirs," sometimes operate to give the parent the entire disposition of the estate, although the testator did not mean any such thing. They are seldom used by a man who makes his own will, without leading to a law suit. It were useless for me to attempt to shew you how to make a strict settlement of your property, and therefore I will not try.

I could, without difficulty, run over the names of many judges and lawyers of note, whose wills made by themselves have been set aside, or construed so as to defeat every intention which they ever had. It is not even a profound knowledge of law which will capacitate a man to make his own will, unless he has been in the habit of making the wills of others. Besides, notwithstanding that fees are purely honorary, yet it is almost proverbial, that a lawyer never does any thing well for which he is not feed. Lord Mansfield told a story of himself, that feeling this influence, he once when about to attend to some professional business of his own, took several guineas out of his purse, and put them into his waistcoat pocket, as a fee for his labour.

Always avoid, and particularly when you make your own will, conditional gifts and devises over in particular events. It is the folly of most testators to contemplate a great many events, for which they too often badly provide. You give me a horse, “and if I

die," you give it to my son. Here a question at once arises, when the death is to happen—Generally? In your life-time, or in my son's? Pray avoid this, and if you must give a thing over, after you have given the entire interest to one, state precisely in what event, and if depending upon the death of the first legatee, whether you mean a death in your life-time, or in the life-time of the legatee over: And I must tell you, that where you have given the absolute interest, you ought not to make any gift over, which will not take effect in a life, or lives, who shall be in existence at your death. The rule goes somewhat further, but I would not advise you, without advice, to go beyond the line which I have marked out; and, indeed, without advice, you will be more bold than wise to go even so far.

Where a man has a large family to provide for, it is often advisable to direct all his property to be turned into money, out of which

he may order his debts and legacies to be first paid, and the residue to be laid out at interest in the names of trustees for the benefit of his family.

If you have given a person a legacy by your will, and you afterwards give the same person another by a codicil, you must declare, whether you mean it to be in addition to the legacy in the will, or in lieu of it.

So if you have given your children legacies by will, and afterwards advance them sums in your lifetime, you should declare by a codicil, whether you mean the sums so advanced, to go in satisfaction of the legacies.

If you have, by your will, given all your estates generally to the same person, and you afterwards purchase any other estates, which you mean to go the same way, you need only re-execute, or, as it is called, republish your will. Take your will, and sign and seal it once more, in the presence of the former, or any other three witnesses, and let them sign the following attestation at your request, and

in your presence: "Re-signed, re-sealed, re-published, and re-declared by the above-named testator, this 24th day of May, 1809, as and for his last will and testament, in the presence of us, who, in his presence, at his request, and in the presence of each other, have hereunto set our names as witnesses thereto."

A subsequent will, duly executed, will revoke a prior one, if inconsistent with it, but in making a second will, it is better expressly to revoke the first. You may also destroy your will, by cancellation, as tearing off the seal, and drawing lines across it, or by tearing, burning, or obliterating it, although verbal evidence is in these cases admissible as to your intention, for the act must be done *animo revocandi*. Therefore, if by mistake you should throw ink all over your will, instead of sand, the will would be good, if it could be made out. And if you make a will which you don't destroy, and then make another inconsistent with the first, but without actually revoking it, and afterwards burn

or otherwise destroy the second, your first Will thereupon revives, and is of the same force as if you had not made another. You must not lose sight of this.

In some instances, the courts have assumed a power of making a man's will void on the presumption that he himself must have intended to revoke it. We seem to have borrowed this from the civil law. The Civilians, indeed, carried the doctrine so far as to hold every will void in which the heir was not noticed, on the presumption that his father must have forgotten him. From this, as Blackstone reasonably conjectures, has arisen that groundless vulgar error of the necessity of giving the heir a shilling, or some other nominal sum, to shew that he was in the testator's remembrance. The practice is to be deprecated, as it wounds unnecessarily the feelings of a disinherited child: This you may say don't always happen—"I give my son Tom," says a testator in his will, a shilling to buy him a rope to hang himself with. God grant, says Tom,

upon hearing the will read, after his father's death, that he had lived to enjoy it himself!"

But not to keep you in suspense, the case in which our courts hold a man's will void, although duly executed, and not revoked, is where he makes his will, and afterwards marries, and has a child, and no provision is made by his will for his wife or child. It is considered, that he must have intended to revoke his will. But I must observe, that as the will is merely held to be revoked on the *presumption* of the man's intention, this presumption may, I conceive, be re-butted by even parol or verbal evidence; therefore, if it can be proved that subsequently to his marriage, and the birth of his child, he declared distinctly and solemnly, that his will should stand, the presumption ceases, and the will cannot be impeached. This, I apprehend, will turn out to be the law, although the question seems to be, at present, afloat. In analogy to other cases, it will be found difficult to refuse the evidence. It is, how-

ever, a question which ought never to arise. When a man marries, he should immediately make a new will to meet the obligations which he has imposed on himself. If he really mean his old will to stand, he should expressly declare so by a codicil.

I HAVE now only to express my hope, that you may derive some benefit from my correspondence. If it merely teach you to distrust your own knowledge on the subject, it will not have been written in vain. I claim no merit for what I have written: it has cost me little more than the labour of writing *currente calamo*. The learning which my letters contain is of common occurrence; but you will not, therefore, find it of less use. It has been justly observed, that refined sense, and enlightened sense, are not half so good as common sense. The same may be said of legal learning. It would have been idle in me to have furnished you with nice disqui-

sitions on abstruse points of law. I have felt no anxiety in any case, to point out to you, how you may evade, or break in upon any rule. I have avoided the lanes and by-ways, and endeavoured to keep you in the public high road. If you wander from it, the blame will rest with yourself.

THE END.

THE FIRST PART OF THE HISTORY OF THE
CITY OF BOSTON, FROM THE
FUNDATION OF THE COLONY, TO THE
PRESENT TIME, IN TWO VOLUMES.
BY JOHN GARDNER, ESQ.
OF THE BARR, AT LINCOLN'S INN.
LONDON: PRINTED BY J. JOHNSON, ST. PAULS CHURCH-YARD.
1790.



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